

Chairman Goodlatte,

My name is Tim Baker. On behalf of the U.S. Custom Harvesters organization I would like to thank you for this opportunity to testify in support of HR 3604.

I currently serve as the Operations Manager/Executive Director of the U.S. Custom Harvesters, Inc. (USCHI). As such, I represent several hundred independent harvesting businesses that directly use foreign labor in order to provide their services to farmers. The businesses in our organization are located in 29 states and provide their mobile harvesting services throughout the U.S. and in portions of Canada. Custom harvesters enable U.S. producers to harvest their crops in an efficient and economical manner without the huge investment in specialized harvesting equipment required by modern harvesting technology. Using some statistics gathered by the Custom Harvester Analysis Management Program (CHAMP) which is administered by USCHI and Kansas State University, and by surveys done of our membership, we know that between 25 and 35 percent of the cereal and feed grains harvested in a given year are harvested by custom harvesters. In addition, our organization also represents custom forage and cotton harvesters. These are direct inputs into the dairy and textile industries.

The whole industry of custom harvesting began during World War II when machinery and manpower were at a premium and farmers were, in many cases, unable to harvest their own crops in a timely manner. Until approximately the last two decades, finding adequate harvest labor for custom harvesters was not a tremendous concern. A pool of high school and college students on summer break were a readily available source of employees for the industry. However, as the industry has changed, and because of the impact of certain Federal laws, it has become increasingly hard for harvesters to fill their labor needs. In past decades many high school and college age persons were employed for the summer. Because of Federal requirements for Commercial Drivers Licenses and their accompanying minimum age requirement, most of these students are left out of the pool of available employees. Further, the industry has lengthened its harvest season by increasing the number and type of crops typically harvested by custom harvesters. The increased number of crops harvested involves a schedule outside the normal summer break for students. Because of the seasonal nature of the business, it has always been difficult to attract qualified responsible adult employees for this type of work. Thus, the harvesting industry has increasingly turned to foreign labor to fill its vacancies.

At the same time that the industry has increasingly turned to foreign labor, the entire process of using those workers under the provisions of existing H2-a system has become increasingly burdensome. Many in the custom harvesting industry feel as if they are left with a "no win" situation. I will use the following information to demonstrate why harvesters feel that they cannot win within the current system. Here is specifically what I am talking about.

1. The Adverse Effect Wage Rate versus Prevailing Wage Rate

The U.S. Custom Harvesters have, for some time, had serious concerns about the wage rate provisions applicable to H-2A custom harvest workers under the U.S. Department of

Labor's Special Procedures for Multistate Custom Combine Owners/Operators ("Special Procedures"). We also believe that there are serious deficiencies in the prevailing wage rate determinations for custom harvesting occupations. These problems are adversely affecting custom harvest operators who use the H-2A program.

The Special Procedures require custom harvesters to pay a minimum monthly wage, plus housing and board. They also require custom harvesters to pay the hourly Adverse Effect Wage Rate (AEWR) for all hours worked in a pay period. In pay periods in which a worker works sufficient hours that the number of hours worked multiplied by the AEWR exceeds one-half the minimum monthly wage promulgated by the USDOL, the employer is required to pay the worker the AEWR multiplied by the number of hours worked, plus housing and board. However, in pay periods in which the number of hours worked multiplied by the AEWR does not equal one-half the monthly wage promulgated by the USDOL, the employer is nevertheless required to pay the worker one-half the USDOL-determined monthly wage, plus housing and board. In effect, the USDOL's Special Procedures impose on custom harvesters an additional wage guarantee (minimum pay in each pay period, regardless of hours worked) not imposed on other H-2A users.

This requirement apparently results from a misapplication of the H-2A regulations at the time the Special Procedures were written. At that time, the Special Procedures were drafted in 1989, USDOL apparently determined that the prevailing method of pay for custom harvester crewmembers was a monthly wage. We have been told that the reason the minimum monthly wage is required is because it was the prevailing wage rate in the occupation. However, the H-2A regulations do not require the payment of the minimum *monthly* prevailing wage rate.

The regulations at 20 CFR 655.102(b)(9)(i) provide that "*If the worker will be paid by the hour*, the employer shall pay the worker at least the adverse effect wage rate in effect at the time the work is performed, the prevailing wage rate, or the legal federal or state minimum wage rate, whichever is highest, for every hour or portion thereof worked during a pay period." [Emphasis added] The regulations at 655.102(b)(9)(ii) further provide that if the worker will be paid a piece rate, the worker must be paid at least the *prevailing piece rate* and must be guaranteed and paid at least the AEWR for all hours worked. However, the regulations nowhere address the circumstance where a worker is paid a monthly wage, and, in particular, do not require paying or guaranteeing a "prevailing monthly wage".

Although the regulations are ambiguous, at best, about the required wage when workers are paid a monthly salary, we are willing to concede that, under the current H-2A regulations where workers in an occupation are subject to hourly minimum wage requirements under the Fair Labor Standards Act, H-2A employers must pay at least the AEWR for all hours worked and a higher prevailing *hourly* wage, if there is one. But we do not believe there is a basis in the regulations for imposing a minimum guarantee of a prevailing monthly wage *in addition to* the requirement to pay at least the AEWR for all hours worked. We believe that custom harvesters should be held only to the requirement to pay at least the AEWR for all hours worked and the three-quarters guarantee, as are all other H-2A employers.

2. Requirements to Provide Free Board

At the time the Special Procedures were written in 1989, The USDOL apparently believed that the provision of free board was a prevailing practice in occupations in which custom harvest crewmembers worked. Whether or not that may have been in the case in 1989 is debatable, but we do not believe it is the case today. Furthermore, the prevailing wage surveys do not provide support for requirement free board. We believe that custom harvesters are being improperly denied the opportunity to require workers to provide their own meals or to deduct a daily meal charge where the employer provides meals, as all other H-2A employers are permitted to do.

In calendar year 2002 USCHI made a request under the Freedom of Information Act (FOIA) for all prevailing wage determinations approved by the National Office for custom harvest crew workers, and the ES-232 reports underlying these determinations. In examining the ES-232 reports, board is indicated as part of the prevailing wage only in Oklahoma and South Dakota. Yet board is listed as part of the prevailing wage determination approved by the National Office in *every* state for which a prevailing wage was approved for custom harvesting occupations.

As will be discussed more fully below, we believe the prevailing wage surveys for custom harvesting occupations are being very poorly done in many states, including the determination of what, if any, benefits are provided with the wage. However, in at least a couple of instances where the state agency did go to the effort to enumerate the benefits that were offered as a part of the wage, the National Office appears to have ignored this information and added free board to the wage even where the survey clearly showed it was not prevailing. For example, in Montana the agency appears to have carefully surveyed and reported the benefits provided to custom harvest workers as a part of their wage, one of the few states to do so. The data showed, as would be expected, a variety of wage and benefit combinations provided by employers, including a cash wage with no benefits at all. If the data had been arrayed properly, the prevailing method or payment in Montana was a monthly case wage, plus health insurance and a 401(k) plan, but not including housing and board. The next most common method of pay was a straight hourly wage with no benefits. The state agency was incorrect in arraying all of the wage-benefit combinations together for the purpose of determining the prevailing monthly wage, but in any case, for the entire sample of 27 workers for whom benefits were reported, only 2 workers were provided full board as part of their pay, and one other was provided lunch. Yet the prevailing wage determination approved by the National Office was a monthly wage, plus housing *and board*.

We point out only one other example here, though there are others. In Arizona, the state agency survey reported wage data for 23 workers. Nineteen workers were paid by the hour, with 9 receiving no benefits, 5 receiving housing and board, and 5 receiving board only. Only 4 workers were paid a monthly wage, ostensibly including housing and board. If this data had been properly arrayed, the prevailing wage was an hourly wage of \$7 per hour, with no benefits. Clearly, the prevailing method of pay was an hourly wage. Yet, the approved National Office prevailing wage was a monthly wage, plus room and board.

We believe that properly conducted prevailing wage surveys with proper prevailing wage determination procedures applied to the resulting data would not support the requirement that custom harvesters provide free meals, and in some states, would not even support a monthly wage.

3. Improperly Conducted Prevailing Wage Surveys

We have carefully examined the ES-232 reports provided in response to our FOIA request and have concluded that, collectively, they indicate that the procedures of ET Handbook 385, and principles of good survey design and methodology, are not being followed, and, therefore, that the wage and benefit data, and the prevailing wage determinations based on this data, are erroneous. Rather than engage in a prolonged and potentially disruptive process of discovery under the state public disclosure laws to obtain the underlying survey data and methodological documentation from the various states, we present below some of the evidence that we believe indicates the surveys are not being done properly, in the hope that the appropriate training and guidance will be provided to the states that ensure accurate surveys *in the future*.

Oklahoma:

The state agency claims there were 500 custom harvesters employing 2600 workers, of which 290 were H-2A workers. The U.S. Custom Harvesters, which represents a large proportion of employers in this industry, has only 49 members in Oklahoma. We do not believe the state agency survey population of 500 employers were custom harvesters, but instead, probably included many individual growers who harvested their own grain, and whose employees were general farm workers, not workers in the subject occupation.

Further, the reported survey results suggest a sloppily done survey, or data that was not based on a survey. The number of employers in the three lowest reported wage categories are all round numbers. All the reported wages are in even hundred dollar increments. All the wages are reported as monthly wages. All of the wages are reported as including room and board. If this survey indeed included wages of 100 employers and 613 workers, as claimed, there would be at least some diversity in the wages reported and in the benefits provided, as there are in many other states with far fewer workers. These results are simply not credible.

Texas:

The Texas agency claims there were 128 custom harvesters, of which they surveyed 70 who reported wages for 76 workers. The U.S. Custom Harvesters has 43 members in Texas. While the number of claimed custom operators in Texas is not as improbably as that reported in Oklahoma, the fact that virtually all employers reported only one employee leads us to suspect this survey, too, did not distinguish between custom harvesters and grain farmers who simply used their own general farm employees to assist with their grain harvest.

This survey reports several different methods of pay, in notable contrast to the far larger Oklahoma survey. However, it does not indicate benefits for any employees. Nevertheless, the National Office prevailing wage determination reports the Texas prevailing wage “plus housing and board”.

South Dakota:

This state also reports a variety of payment arrangements, which is more credible than the Oklahoma result. However, the survey indicates that every employee received housing and board. We doubt that this could be accurate for 94 workers.

Minnesota:

The National Office’s memorandum transmitting 2001 prevailing wage determinations for custom harvester occupations states that the prevailing wage for Minnesota was based on the 2000 rate. However, in the FOIA package, there was an ES-232 prepared in 2001 by the Minnesota agency. The 2001 ES-232 reported wages for 7 workers, all paid by the hour with no benefits. However, the National Office’s memorandum sets a monthly wage plus housing and board based on the previous year’s survey. It seems highly improbable that a prevailing wage survey from one year would show a prevailing method of pay of a monthly wage plus room and board and the survey the next year would not show a single worker being paid by that method of pay. We believe the National Office’s prevailing wage determination for Minnesota is highly questionable, based on the 2001 data reported.

We would also note that U.S. Custom Harvester has 24 members in Minnesota, nearly as many as in a number of other states where surveys were conducted. We believe there are sufficient employers in Minnesota to provide a basis for a valid prevailing wage survey.

Kansas:

The Kansas agency’s ES-232 report claims there are 500 employers of custom harvest workers, yet the agency included only 22 employers in its survey and reported wages on only 35 workers. The U.S. Custom Harvesters has more than 100 members in Kansas. We do not believe this is an adequate sample size for the Kansas survey.

In the Kansas survey, 4 workers were paid by the day, 4 by the hour, and 27 by the month, some with and some without housing and board. The state incorrectly arrayed the wages with housing and board and without housing and board together. If they had been separated, a monthly wage of \$1500 without housing and board would have been the prevailing method of pay. Even combining the data with and without room and board, which the agency did and which we believe is improper, a monthly wage of \$1400 would have been prevailing, based on the combined data. Yet, the National Office’s determination was \$1500, plus housing and board. The National Office’s prevailing wage determination is not substantiated by the Kansas survey.

4. Corrective Action Needed

To summarize, we believe the following corrective action is needed to treat employers of custom harvesters fairly and in compliance with the H-2A regulations and policies:

1. Custom harvesters should be required to pay only the hourly AEW for all hours worked, unless a higher prevailing *hourly* rate is determined for a particular state.
2. Custom harvesters should be permitted to take a daily meal charge deduction on the same basis as other H-2A employers, or where practical, require workers to provide their own meals.
3. State agencies should be trained in and required to adhere to USDOL's policies for conducting prevailing wage surveys, including (but not limited to) the following:
 - a. Including only members of custom harvest workers in the survey, and not the employees of fixed site growers harvesting grain on the grower's farm.
 - b. Including an adequate sample of employers of U.S. workers in the survey.
 - c. Using survey procedures that will assure collecting accurate data on the method or pay, rate of pay, and benefits of workers.
 - d. Separating wage data with different benefit packages, and basing prevailing wage findings on the prevailing method of pay/benefit package, so that free board would only be required in situations, if any where free board was included in the prevailing method of pay.
4. The National Office should carefully monitor state agency survey procedures, to assure that the proper procedures are being followed, and carefully review survey results before approving and disseminating rates.

It is the desire of the U.S. Custom Harvesters to cooperate and assist the USDOL to conduct surveys and administer the H-2A program for custom harvesters in a manner that is in compliance with the regulations and that is fair and reasonable to both the employers and workers. We will be happy to discuss further any of the problems outlined above and to work with the USDOL to resolve them.

Further, and more importantly, it is the desire of the U.S. Custom Harvesters to assist this committee and all on Capitol Hill to pass legislation that would eliminate this burdensome and inaccurate system of wage and benefit determination.

5. The currently litigious system:

I can assure you that some of our members are not happy that I am here today. They don't want me here because they feel that they, and our industry have been selected for special harassment. Many would just as soon keep their heads low and hope that they are not selected for the next audit by the Department of Labor. In case after case, persons have had much of their lifelong investment in their businesses taken away from them by a few in the DOL's enforcement branch. In nearly every case, the H2-a user believed that they were following the current standard and had made every effort to comply, only to find out that they were only slightly out of compliance. Yet it often cost them tens of thousands of dollars in fines even though they had, in good faith, tried to comply with regulations. In other cases, disgruntled employees have reported their employers for a variety of issues and fines were assessed without any evidence excluding the statement of the former employee. Users were then forced to prove their innocence through a mountain of record keeping and paperwork in order to avoid hefty fines. It is my opinion that far too much leeway is given to some of the enforcement people without any consequences for them if they consistently wrongfully abuse their authority. I have personally spoken to a former H2-a user that now openly hires illegal employees. This person stated that for him it was far less costly to pay any possible fines for using an illegal than to try to be legal and deal with the current system and their outrageous fines and enforcement procedures. For persons in our industry no adage is more accurate than "make hay while the sun shines". Yet when an audit is done, a harvester may be shut down for days while inspectors comb through interviews, paperwork, and the like. Even when absolutely no wrong was found on the part of an employer, he might have lost thousands of dollars of income while millions of dollars of machinery sat idle. This is abusive and must be eliminated.

Conclusion:

The chairman appears to understand the struggles of H2-A users very well, and realizes that meaningful reforms to the current H2-a system are required. I encourage all members of the House, especially those whose constituency is in any way agricultural, to consider the need as well. The scope of the Chairman's bill will help correct many of the key issues of the antiquated system. The U.S Custom Harvesters would welcome the opportunity to provide input and additional ideas that we believe would help streamline the process further.

Thank you for your time.